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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES LEONARD WALKER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Walter Bilbro, Jr.
WALTER BILBRO & ASSOCIATES, P.A.
38 Broad Street
Post Office Box 687
Charleston, South Carolina 29402
803-722-7772

David H. Frackelton
WIDENER & FRACKELTON
Post Office Box 357
Bristol, Virginia 24203

Cody W. Smith, Jr.
SOLOMON, KAHN, SMITH & BAUMIL
Post Office Drawer P
39 Broad Street
Charleston, South Carolina 29402

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

I.

Did the trial court err in receiving into evidence at Petitioner's trial the fruits and testimony of the stop, search and seizure of Petitioner and the motor vehicle he was operating when there was no evidence of probable cause introduced at the trial?

II.

Was Petitioner denied due process when the trial court failed to fully define and instruct the jury about the term "reasonable doubt", and thus erred in failing to charge Petitioner's requested Instruction H?

III.

Was Petitioner denied due process when the trial court failed to instruct and define the terms "not guilty" and "innocent" when the jury was deliberating possible verdicts, and thus erred in not charging Petitioner's requested Instruction C?

IV.

Did the Trial Court err in failing to dis-

miss the original arrest and search warrants because the issuing magistrate was not a neutral and detached judicial officer at the time she issued the warrants for she was also a correctional officer appointed by the lower court with law enforcement powers?

V.

Would the issuing of arrest and search warrants by a judicial officer who was also a correctional officer of the executive branch violate Petitioner's right of due process?

PARTIES

The parties are properly set forth in this Petition's caption.

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Wong Sun v. United States, 341 U.S. 471 (1963)

Articles:

V. Bugliosi, Not Guilty and Innocent-The Problem Children of Reasonable Doubt, Crim. Just. J., W. St. U., San Diego (Copyright 1981).

Other Authorities:

The Code of Virginia (1950) Section 12.2-37

Fifth Amendment, United States Constitution

Fourteenth Amendment, United States Constitution

REPORTS OF OPINIONS

The opinions of the Supreme Court of Virginia handed down September 1, 1982, in Record Number 82006, Circuit Court No. 4-81-11, and the Orders of the Circuit Court of Washington County, Virginia, are unreported at the present time. The text of these opinions is set forth in the Appendix to this Petition.

JURISDICTION

The opinion of the Supreme Court of Virginia was decided and entered September 1, 1982. The jurisdiction of this Honorable Court is invoked by the Petitioner praying review of the decision of this highest appellate court of the Commonwealth of Virginia denying him relief because his Federal Constitutional rights had been violated in a criminal prosecution instituted by the Commonwealth of Virginia against Petitioner, a citizen of the United States and resident of South Carolina.

UNITED STATES CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

AMENDMENT IV (Article)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V (Article)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI (Article)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV (Article)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2... .

CODE OF VIRGINIA, 1950, AS AMENDED

SECTION 19.2-37

19.2-37. Who may be appointed magistrate. Any person may be appointed to the office of magistrate under this title subject to the limitations of chapter 4 (Section 2.1-30 et seq.) of Title 2.1 of the Code and of this section.

A person shall be eligible for appointment to the office of magistrate under the provisions of this title: (a) if such person or his spouse is not a law-enforcement officer or otherwise charged with the duty of enforcing any of the laws of this Commonwealth or any ordinance of any political subdivision thereof...

CODE OF VIRGINIA, 1950, AS AMENDED

SECTION 15.1-48

15.1-48. Appointment of deputies; their powers; how removed. The treasurer of any county or city, the sheriff of any county or city, any commissioner of the revenue, any county clerk and the clerk of any circuit or city court may at the time he qualifies as provided in Section 15.1-38 or thereafter appoint one or more deputies, who may discharge any of the official duties of their principal during his continuance in office, unless it be some duty the performance of which by a deputy is expressly forbidden by law....

The sheriff may appoint as deputies such treatment and rehabilitation employees as are authorized and approved by the State Board of Corrections pursuant to Section 53-184 without approval by the State Compensation Board...

The officer making any such appointment shall certify the same to the

court in the clerk's office of which the oath of the principal of such deputy is filed and a record thereof shall be entered in the order book of such court...

STATEMENT OF THE CASE

This case began on December 11, 1980, about 7:00 o'clock P.M. when Virginia State troopers stopped the Petitioner and the automobile he was operating and conducted a warrantless search and seizure of both without probable cause. On December 12, 1980, in the early morning hours, search and arrest warrants were issued charging that Petitioner on December 11, 1980, possessed Methaqualone and marijuana with intent to sell. (See Appendix C (8) and (9)) A preliminary hearing was held, and on April 14, 1981, the Grand Jury of Washington County, Virginia returned a true bill on a two count indictment.

The Petitioner was tried before a jury on August 4, 1981. The day before, the trial court heard Petitioner's suppression motion challenging Fonda B. Smith's ability to perform a judicial officer's function when she signed the search and arrest warrants and handled other preliminary matters

pertaining to his arrest and jailing. (See Appendix C (1)) This motion to suppress evidence was based on Fonda B. Smith's inability to perform a judicial officer's function because she was simultaneously holding a prior appointment as a correctional officer for Washington County. (See Appendix C (2)) The Motion was denied by the Court. (See Appendix B (1))

At trial, evidence leading to the Petitioner's arrest was presented by the Commonwealth's witnesses, Virginia State Troopers, James E. Asbury and R. L. Givens. The testimony recited that Trooper Asbury of the Virginia State Police began his initial investigation into events surrounding the arrest of the Defendant prior to December 11, 1981. On December 11, 1981, Asbury received a phone call from an informant. Thereafter, a State Police Surveillance Team was sent to the Abingdon, Virginia area. This team had been directed to check all local motels in the Abingdon area for

out-of-state vehicle licenses, preferably automobiles displaying South Carolina tags. No further description had been given for occupants of any suspect vehicle, and no description or any identifying information of the type or make of vehicle had been provided to the troopers.

A 1975 Mercury vehicle bearing Florida license tags was located at the Empire Motel. Trooper Givens together with Trooper Lilly began surveillance at the Empire Motel about 6:00 P.M. on December 11th. The troopers positioned themselves so that they could observe this vehicle later identified as a 1975 Mercury Coupe owned by John Joseph Fickett, Jr. After watching this vehicle for about 30 to 45 minutes, two males exited a motel room and came to the vehicle, opened its truck, and removed a brown paper bag with one of the subjects, later learned to be Walker, carrying the paper bag. The two returned to the room on the second level of the motel with the brown

paper bag in their possession. Trooper Givens testified the bag removed from the vehicle's trunk appeared to be a grocery bag with no evidence of contraband.

Trooper Givens later saw the same two subjects, whom he did not know by name at that time, leave their motel room, come directly to the Mercury automobile, and get into the front seat. When the two subjects returned to the automobile from the motel room, neither was carring personal baggage, a brown paper bag or any other personal container with them, and further, neither subject went into the trunk of the automobile. The Mercury vehicle was then driven away from the motel.

The subjects proceeded from the motel onto U. S. Highway 11 where they were stopped after traveling several miles by a waiting uniformed State Trooper. The Mercury vehicle committed no traffic violations prior to the stop, and the vehicle pulled over and stopped on the roadside in a

routine fashion. The subjects made no attempt to escape when the State Troopers pulled them over, and they did not do any overt acts which warranted their stop and detention.

Trooper Asbury testified that the only reason the 1975 Mercury automobile was pulled over was based on information that he earlier received from an informant. No evidence or testimony was received at trial to show what detailed, believable and reliable information, if any, had been provided to any law enforcement officials prior to the stop and warrantless search of the Mercury automobile, its two occupants, and its contents. Nothing was presented into evidence to establish the believability of this information. (See Appendix C (3))

After the vehicle's stop, Trooper Asbury with six policemen converged and found the driver to be the Petitioner. A Mr. Fickett was the front seat passenger and later determined to own the vehicle. The

troopers searched the vehicle's two occupants for weapons, and at Asbury's instructions, the Petitioner produced his driver's license, and Fickett the vehicle registration. Asbury advised the occupants he had information they were transporting Methaqualone and possibly marijuana, and he was conducting a warrantless search of the vehicle as the result of the information. Walker and Fickett were detained by other members of the surveillance team. The vehicle nor its occupants were free to leave.

The troopers searched the passenger compartment, but found nothing. Trooper Asbury then had Trooper Gregory with his narcotics dog to further assist him in the warrantless search. The dog was first exercised in nearby bushes and then was taken to the front of the Mercury automobile. Both doors to the passenger compartment as well as the locked trunk were opened by the troopers. The narcotics dog walked completely around the car but did not alert on

anything. The dog was then placed in the passenger's compartment where it conducted a full search and found nothing of interest. The troopers accompanied by the dog then went to the vehicle's trunk which the troopers had opened. By then considerable time had elapsed.

At trial, Petitioner then objected to testimony after the troopers opened the trunk without a warrant because there had been no foundation laid by the Commonwealth for conducting a warrantless search of the vehicle. Petitioner further amplified this objection to object to any testimony about any investigation eminating from the opening of the trunk and its search. These were continuing objections throughout the trial. (See Appendix B (2))

Over Petitioner's objections, Trooper Asbury testified that there were no drugs or drug paraphernalia in plain view; however, he did see personal luggage and containers including a rolled up brown paper

bag in the trunk. The dog while outside of the trunk did not alert, however, upon being placed in the trunk by the handler, the dog began scratching at and tore the brown paper bag.

The rolled up brown paper bag was removed by Trooper Gregory from the Mercury's trunk and handed to Asbury. It was then that Asbury observed a rip in the side of the bag through which he could see white tablets which he believed to be Methaqualone tablets. Trooper Asbury testified that during their entire surveillance and during the course of the stop and search, no drug related violation up to this point was open to plain observation and view. Asbury testified he took custody of the bag, opened the bag's top and examined its contents. He found drugs and a revolver.

Trooper Asbury walked over where Mr. Walker and Mr. Fickett were being detained by other members of the police team, apprised them of what he had found in the

brown paper bag, and placed them under arrest. There were other items in the trunk, to-wit: a large brown trash bag which appeared to contain a box, a brown suit case, a green backpack, and a dog food bag. Walker and Fickett were asked to consent to a search of the these materials in the trunk. After interviewing Mr. Walker and Mr. Fickett about the ownership of the items contained in the trunk, Trooper Asbury ascertained that Mr. Walker only owned the green backpack, and the remaining items were acknowledged to be owned by Mr. Fickett. Walker and Fickett declined to sign a consent to search form, and Trooper Asbury advised them that a search warrant would be obtained for the unsearched items in the trunk. The Commonwealth was allowed to introduce the brown paper bag and its contents together with the box and its contents into evidence over Petitioner's continuing objection. (See Appendix B (2))

The automobile, its contents, its

occupants, and the police entourage then went to the Washington County Jail in Abingdon, Virginia. The magistrate subsequently issued the search warrant requested by Tooper Asbury. Pursuant to this warrant, Trooper Asbury broke open and searched the contents of the unsearched articles in the Mercury automobile's trunk. The search of the box contained in the garbage bag turned up a quantity of Methaqualone tablets.

At trial, Petitioner objected to the introduction into evidence of the search warrant and its affidavit together with the results of any search conducted thereafter because there had been no foundation to show that the Commonwealth's police had believable and reliable information which was lawfully obtained to establish probable cause upon which to apply for and to receive the search warrant. The Petitioner further objected to the introduction of the search warrant and affidavit into evidence on the ground there was no testimony in evidence

about the scope and freshness of the information received from the informant or the credibility of his information. (See Appendix B (3))

On the close of the Commonwealth's case, Petitioner's Motion to Strike the Evidence and to discharge him was made. The court denied the Motion, the Petitioner rested his case, and again renewed his Motion to Strike the Evidence and discharge him. The court denied this Motion.

At the close of trial, the Commonwealth and Petitioner submitted jury instructions to the trial judge. The court then charged the jury. (See Appendix C (6) for the complete charge.) Two lettered instructions offered by the Petitioner defining and instructing the jury on the terms, "guilt", "innocence", and "reasonable doubt" (See Appendix C (7) were refused by the court. (See Appendix B (6) (7)) Petitioner expanded the objection to include that the court was prohibiting his right to have

the jury given full and proper instructions on his legal theories of the case. The court maintained its ruling.

The jury heard the court's instructions and argument of counsel. The jury deliberated and returned guilty verdicts on both counts. The court advised the Petitioner could make written motions to set aside the verdict prior to the time of sentencing. (See Appendix B (4)) A Motion to Set Aside the Verdict was duly filed and argued. (See Appendix C (4)) The court denied the motion. (See Appendix B (5)) The Petitioner then filed a Petition for Appeal to the Supreme Court of Virginia. (See Appendix C (5)) The Petition was denied on September 1, 1982. (See Appendix A) The Petitioner is presently incarcerated pursuant to this sentencing Order of October 14, 1981. (See Appendix B (5))

ARGUMENT

I.

DID THE TRIAL COURT ERR IN RECEIVING INTO EVIDENCE AT THE PETITIONER'S TRIAL THE FRUITS AND TESTIMONY OF THE STOP, SEARCH AND SEIZURE OF PETITIONER AND THE MOTOR VEHICLE HE WAS OPERATING WHEN THERE WAS NO EVIDENCE OF PROBABLE CAUSE INTRODUCED AT THE TRIAL?

The Supreme Court's decisions have held that police officers, in the absence of a warrant, may stop and search an entire vehicle under the automobile exception to the Fourth Amendment, if the search of the whole vehicle is made upon probable cause justifying that extensive a search. Carroll v. United States, 267 U.S. 132 (1925), Chambers v. Maroney, 399 U.S. at 42. The scope of a legitimate warrantless search is to be confined to the object of the search and the place in which there is probable cause to believe that it may be found. United States v. Ross, 456 U.S. ____, 102 S.Ct. 2157, 72 L.Ed.2d (1982). The seizing

officer must have reliable, adequate information that the automobile somewhere contains in its premises that which by law is subject to seizure. Carroll, Supra at 149.

> "Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." Ross, Id. at 2172.

In Ross, the trial record established that the officers were acting upon information from a reliable informant who stated he had just observed Ross complete a sale of narcotics from the trunk of his car and had heard Ross say that additional narcotics were in the car. The informant then gave the officers a detailed description of Ross and the automobile he was driving. The officers immediately drove to the area designated by the informant, located the described person and car, and proceeded to stop and search the entire automobile. The

officers found drugs in the trunk as the informant has apprised them. Id. at 2168, n. 22.

In Petitioner's case, the Virginia State Troopers' reasons for stopping and conducting a warrantless search of Petitioner and the automobile he was driving were not supported by probable cause in the trial record. The record reflects that Petitioner was never seen to place anything into the trunk or the passenger compartment of the car prior to the stop and detention. Trooper Givens testified that he saw two subjects remove a brown grocery bag from the trunk of the car located in the motel parking area and take it into a room. Shortly thereafter, the subjects returned to the automobile emptyhanded, immediately entered the passenger compartment, and drove off. There was no testimony as to any reliable, credible information in the troopers' possession describing the automobile or the nature of contraband it might contain. No evidence

set forth any detailed description of persons bringing the drugs.

No prior traffic violations by Petitioner had occurred when the uniformed Virginia State Trooper stopped him while driving towards the state line. In fact, the automobile was stopped because of alleged information received from an alleged informant, none of which was introduced at trial. The trial record is silent about any information in possession of the informant or troopers as to the existence of any contraband, the nature of any contraband, whether any contraband was in the Petitioner's possession at the time, whether any contraband was in the possession of Petitioner's companion at the time, or if any contraband was in a 1975 Mercury Coup with Florida tags in which Petitioner was traveling.

The troopers conducted an unlawful investigatory stop and warrantless search of the Petitioner, the passenger compartment,

the trunk, and a closed brown paper bag in the trunk of the automobile Petitioner was driving which included the use of a specially trained narcotics' dog, all in the absence of facts indicating sufficient probable cause. The fruits of the officer's search and seizure should have been excluded from evidence when Petitioner objected to their introduction at trial.

Sharpe v. United States, 660 F.2d 967, held that a law enforcement official may stop a moving vehicle without a warrant and for less than probable cause, but imposed two pre-stop requirements. First, that the detaining officers possess a reasonable suspicion of illegality supported by articulable and objective facts, and second, that the stop must be cursory and brief. The brevity requirement is especially important the court continued, "for it is the transitory nature of the stop that justifies the elimination of the probable cause requirement." Id. at 969.

In Sharpe, the police stopped two vehicles that they suspected of transporting drugs. They then held the occupants while they asked questions, obtained identification, and inspected the outside of the vehicles. By the time one of the officers smelled the strong oder of marijuana eminating from one of the vehicles and decided to take the entire entourage in for further investigation, forty (40) minutes had expired.

There is no evidence on the trial record that would give rise to a reasonable suspicion based upon articulable and objective facts, and this record will further indicate that due to the lengthy sequence of events subsequent to the stop, the brevity requirements in Sharpe were exceeded. After stopping the automobile without finding anything on the occupants or in plain view in the automobile, any further detention or search of Petitioner and the automobile he was driving must be based upon consent or

probable cause. United States v. Bregoni-Ponce, 422 U.S. 873 (1975).

To establish probable cause based upon an informant's tip, the prosecution must show "underlying circumstances" sufficient to support the informant's conclusions and the conclusion of the police that the informant "was 'credible' or his information 'reliable'." Aguilar v. Texas, 378 U.S. 108, 114 (1964).

Beck v. Ohio, 379 U.S. 89 (1964), held that specificity as to what the informer actually said and why the informer and his information were thought to be credible and reliable must appear on the record in order to establish probable cause for arrest without a warrant. The arresting officer in Beck testified he had information and had heard reports from someone he knew to be reliable that Petitioner had a record in connection with a clearing house and schemes of chance. There was no testimony that the informer had said the person could be found at

the time and place where the arrest was made and the record was silent as to any objective facts to support a belief that Petitioner had acted or was then acting unlawfully. The officer testified only that he had information, that he had heard reports, that someone specifically did relate that information, and that he knew who that person was. There was never any indication as to the contents of the information and reports the officer had received. Beck went on to say that "no decision of this court has upheld the constitutional validity of a warrantless arrest with support so scant as this record presents." Id. at 95.

The facts in Beck stand on all fours with Petitioner's contention on appeal. The arresting officers lacked probable cause as shown by the trial record to conduct a stop and legitimate warrantless search of the Petitioner, the passenger compartment, locked trunk, and personal container in the trunk of the automobile which

Petitioner was driving. Accordingly, all evidence obtained from the illegal stop, search and seizure must be excluded as fruits of the poisonous tree. Wong Son v. United States, 341 U.S. 471, 83 S.Ct. 407 (1963).

We anticipate the Commonwealth will attempt to correct the warrantless illegalities by saying the arresting officer, subsequent to the stop, search, and use of the narcotics dog, obtained a warrant before any further search of the innocuous appearing personal articles located in the trunk of the car. This argument fails due to evidence giving rise to probable cause being the fruit of the illegal warrantless search. The warrant and attached affidavit will show that it was admittedly the contents of the closed brown bag secured in the locked trunk of the automobile that led the arresting officers to believe that probable cause existed for the issuance of a warrant. The officers then sought and obtained

blanket permission by search warrant to search the whole car and those remaining articles of interest in the trunk of the vehicle. The evidence seized in each search must be surpressed, and the evidence derived therefrom excluded.

II.

WAS PETITIONER DENIED DUE PROCESS WHEN THE TRIAL COURT FAILED TO FULLY DEFINE AND INSTRUCT THE JURY ABOUT THE TERM "REASONABLE DOUBT", AND THUS ERRED IN FAILING TO CHARGE PETITIONER'S REQUESTED INSTRUCTION H?

At the close of the trial, the trial court charged the jury:

> "The defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case." See Appendix C (6))

The above quoted instruction was the trial court's only effort to explain reasonable doubt. When Petitioner sought to have the court give his instruction defining reasonable doubt, the trial court refused stating it was repetitious of what had been granted. (See Appendix B (7)) Petitioner's requested instruction recited:

"Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.'" People v. Garcia, California Court of Appeals, December 29, 1975.

It is Petitioner's contention that the aforesaid Instruction fails to put forth a definition of reasonable doubt. Here, the

court instructs the jury in the negative stating that "This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceiveable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction." The Instruction given by the court barely touches the scope of the legal term, "reasonable doubt." Not once did the trial court attempt to establish a clear definition of the term which the jury could use in its deliberations.

The United State Supreme Court in In Re Winship, 397 U.S. 358, (1970), stated it is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. "It is also important in our free society that every individual going about his ordinary affairs have confidence that its government cannot adjudge him guilty of a criminal

offense without convincing a proper fact finder of his guilt with utmost certainty." Id. at 364.

The court in Miles v. United States, 103 U.S. 304, found reasonable doubt to be "such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists. A balance of proof is not sufficient." Id. at 309.

The trial court's failure to explain reasonable doubt to the jury allowed it to supply an unknown standard of proof to the evidence. The term "reasonable doubt" carries great significance in a criminal trial, and we cannot expect its legal definition to be supplied by lay jurors based on common usage. The trial court's failure to explain "reasonable doubt" effectively denied the Petitioner the indisputable component of every criminal trial, the yardstick with which to measure the evidence.

III.

WAS THE PETITIONER DENIED DUE PROCESS WHEN THE TRIAL COURT FAILED TO INSTRUCT AND DEFINE THE TERMS "NOT GUILTY" AND "INNOCENT" WHEN THE JURY WAS DELIBERATING POSSIBLE VERDICTS, AND THUS ERRED IN NOT CHARGING PETITIONER'S REQUESTED INSTRUCTION C?

The Petitioner requested the trial court instruct the trier of fact as follows:

> "The term 'not guilty' is not synonomous with 'innocence'. In our system of criminal justice, the term, 'not guilty' means that the Commonwealth did not prove that defendant guilty beyond a reasonable doubt of each element of an offense; 'not guilty' does not mean that you must find the defendant 'innocent' of the crimes with which he was charged. The charges were simply not proven by the Commonwealth." (See Appendix B (6))

It is elementary that the function of the trier of fact is not to decide whether a criminal defendant did not commit the crime, but to determine whether or not the prosecution has met its burden of proving the defendant's guilt beyond a reasonable doubt. In a criminal trial, "not guilty" and "innocence" are frequently erroneously used

interchangeably by courts and legal counsel.[1] This results in the jury being misled and confused from time to time. Common usage of the word "innocent" as with the word "guilty" denotes a specific factual discription of a reality. "Innocent" factually describes a man who did not commit the crime. "Guilty" factually describes the

1 In the recent 1981 case of Bullington v. Missouri, 451 U.S. 430 (1981), United States Supreme Court Justice Powell wrote:

> "Underlying the question of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged. From the time an accuser first suspected to the time the decision on guilt or innocence is made, our criminal justice system is designed to enable the trier of fact to discover the truth according to law."

Jackson v. Denno, 378 U.S. 368 (1964), the Supreme Court declared the function of the criminal trial jury is "adjudicating guilt or innocence." The court then referred to the erroneous determination of "guilt or innocence" on other occasions throughout the Jackson opinion.

person who committed the crime. "Not guilty" is the legal finding by the criminal trial jury that the state has not met its burden of proof. A guilty verdict by a jury is a legal finding that the prosecution has met its burden of proof.

"Innocent" is not one of the possible verdicts which a jury may return at the trial of a criminal case. A criminal trial jury may find the defendant "guilty" or "not guilty" but may never find the defendant "innocent". To afford the defendant a fair trial, the criminal trial jury must be instructed adequately and correctly on the meaning and import of the possible verdicts. It should also be instructed to avoid confusion between the terms "not guilty" and "innocence".

The jury may find a criminal defendant not guilty from either of two states of mind on the evidence received in the trial, to wit, the jurors may believe the defendant is factually innocent of any wrongdoing in the

crime for which he is charged, or the jurors do not necessarily believe the defendant is factually innocent and may even tend to believe that he committed a crime, however, the evidence as a whole is insufficient to persuade them of the defendant's guilt beyond a reasonable doubt. Under the American Criminal Jurisprudence, a jury must find a defendant not guilty even when they are in such a state of mind that they believe the defendant is guilty by a preponderance of the evidence (the civil standard of proof), but do not believe the defendant has been proven guilty beyond a reasonable doubt (the higher criminal standard of proof). V. Bugliosi, Not Guilty and Innocent-The Problem Children of Reasonable Doubt, Crim. Just. J., W. St. U., San Diego (Copyright 1981).

No where in the trial court's charge did it cover or define the legal principals of "not guilty" and "guilty", nor did he distinguish the term "not guilty" from the

term "innocence". The term "innocence" was used repeatedly throughout the court's charge when it instructed the trial jury on the presumption of innocence.

Petitioner's requested Instruction supports his theory of the case for he does not deny being present at the time the vehicle was stopped and searched; however, Petitioner at his trial denied and demanded proof beyond a reasonable doubt that he was criminally connected with contraband. He is entitled to an instruction articulately explaining to the jury that its function is not to determine Petitioner's guilt or the innocence, but to only determine whether or not the prosecution has proven guilt beyond a reasonable doubt. The failure of the lower court to see the importance of such a timely instruction either misinstructed the jury or allowed it to wander away from its central function in a criminal trial because it lacked sufficient instruction by the trial court.

IV.

DID THE TRIAL COURT ERR IN FAILING TO DISMISS THE ORIGINAL ARREST AND SEARCH WARRANTS BECAUSE THE ISSUING MAGISTRATE WAS NOT A NEUTRAL AND DETACHED JUDICIAL OFFICER AT THE TIME SHE ISSUED THE WARRANTS FOR SHE WAS ALSO A CORRECTIONAL OFFICER APPOINTED BY THE LOWER COURT WITH LAW ENFORCEMENT POWERS?

At the pre-trial hearing, Petitioner made a motion, through counsel, to dismiss the original arrest and search warrants because the issuing magistrate, Fonda B. Smith, was not a neutral and detached judicial officer at the time she issued the warrants. This motion was made pursuant to Section 19.2-37 of The Code of Virginia, 1950, as amended, which states in part that "A person shall be eligible for appointment to the office of magistrate under the provisions of this title; (a) if such person or his spouse is not a law enforcement officer or otherwise engaged in the duties of enforcing any of the laws of this Common-

wealth...". This motion was denied.

The pre-trial record shows that on July 7, 1976 at the request of the Washington County Sheriff, the Circuit Court of Washington County, Virginia, by written order appointed Fonda B. Smith a fulltime correctional officer. The record further shows that on March 30, 1977, Fonda B. Smith was appointed by written order of the same court a fulltime judicial officer. The Circuit Court of Washington County issued no further orders indexed under the names, Fonda Smith or Fonda B. Smith. The record is silent regarding Fonda Smith's status as a fulltime correctional officer at the time she issued the search and arrest warrants involving the Petitioner. However, there is no letter of resignation or a written order relieving her of her appointment as a fulltime correctional officer. There is mentioned in an order dated March 30, 1977 of that court indexed under the name of Nellie Foster wherein Nellie Foster is appointed a

matron and deputy sheriff, replacing Fonda Smith.

The Supreme Court in Shadwick v. City of Tampa, 407 U.S. 345 (1972), held that an issuing magistrate must meet two tests: First, he must be neutral and detached, and second, he must be capable of determining whether probable cause exists for the requested arrest or search. The court recited that "whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement." Id. at 350. It is clear from the records of the Circuit Court of Washington County, Virginia, that there has not been a final determination of Fonda Smith's status as a fulltime correctional officer. Therefore, the test of neutrality and detachment set forth in The Code of Virginia, 1950, which complies with the Shadwick holding was not met. The appointment of Fonda B. Smith as a judicial officer in the Twenty-Eighth

Judicial District for a term beginning April 1, 1977 and ending March 31, 1981 is null and void ab initio because of the earlier unrecinded and unmodified order of the same court appointing her a correctional officer on July 7, 1976.

V.

WOULD THE ISSUING OF ARREST AND SEARCH WARRANTS BY A JUDICIAL OFFICER WHO WAS ALSO A CORRECTIONAL OFFICER OF THE EXECUTIVE BRANCH VIOLATE PETITIONER'S RIGHT OF DUE PROCESS?

Lisenba v. California, 314 U.S. 219 (1941), held that a denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. "In order to declare a denial of it, we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." Id. at 236.

Here, the abuse of power complained of is the issuing of arrest and search war-

rants by a judicial officer who was also a correctional officer at the time. The Supreme Court in United States v. Di Re, 332 U.S. 581 (1948), held that the law of the place where an arrest is made shall determine its validity. As set forth above, the arrest and search warrants in Petitioner's trial were issued in violation of Section 19.2-37 of The Code of Virginia, 1950, as amended. The failure of the court to observe that which is essential to the very concept of justice and proceed upon the warrants over Petitioner's objection constitutes a denial of due process under the Fifth and Fourteenth Amendments to The United States Constitution.

CONCLUSION

The Virginia Supreme Court refused to grant review of the questions presented in this Petition. If the trial court of Washington County, Virginia is not to be a court of last resort with no appellate review available, then the only alternative is for The Supreme Court of the United States to review Petitioner's case.

Submitted by:

Cody W. Smith, Jr.
Walter Bilbro, Jr.
David H. Frackelton

APPENDIX A

OPINION OF SUPREME COURT OF VIRGINIA

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 1st day of September, 1982.

James Leonard Walker, Appellant, against Commonwealth of Virginia, Appellee.

From the Circuit Court of Washington County. Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

APPENDIX B (1)

RULING ON PRETRIAL MOTION TO DISQUALIFY MAGISTRATE AND SUPPRESS EVIDENCE.

PRETRIAL TRANSCRIPT, PAGE 6, LINE 24 THROUGH PAGE 7, LINE 10

THE COURT: He didn't desire to call her. The Court does send to the Clerk a list of those deputies of the various constitutional officers who are appointed deputies. The appointment is not for any period of time. The statute does not require that. This case is a little different from most in that the Orders entered by this Court does show that prior to April 1, Fonda Smith has been replaced by another person. Most Orders do not show any replacement or if they show who comes on, it doesn't show who they replace. That's mainly for purposes of bond as I understand the law. But in this case on Book 40, Page 522, you will find that the Court was well aware that Fonda Smith was no long-

er a deputy and the Court appointed her as a magistrate, and for a term of four years and that appointment was good, and your motion that the warrant issued by the magistrate be declared null and void is denied.

APPENDIX B (2)

RULING ADMITTING EVIDENCE AT TRIAL BASED ON WARRANTLESS SEARCH AND SEIZURE

TRIAL TRANSCRIPT, PAGE 13, LINE 21 THROUGH PAGE 19 LINE 6.

DAVID H. FRACKELTON: If the Court please, at this point we would enter an objection to opening the trunk without a warrant. It's been described as a warrantless search and to this point, they have not laid any foundation for a warrantless search. They have testified there was no violation--

THE COURT: I've heard the testimony. You don't have to quote it.

DAVID H. FRACKELTON: If the Court--will the Court hear our objection?

THE COURT: Yes.

DAVID H. FRACKELTON: We would object to any further testimony about any investigation as a result of opening the trunk. There has been no testimony that there was a waiver of

consent or there was consent given.

THE COURT: Overruled.

DAVID H. FRACKELTON: State an exception.

THE COURT: Yes.

DANIEL M. HALL: Go ahead with what you're--

DAVID H. FRACKELTON: Now, if the Court please, may we state our basis for the objection for the purpose of the record? The case law.

THE COURT: Yes. Members--Mr. Sheriff, you may take the Jury to their room. (Thereupon, the Jury retired to their room and the following proceedings were had out of their presence.)

THE COURT: Alright. You may proceed.

DAVID H. FRACKELTON: Now, if the Court please, before proceeding on that, it is my understanding from prior testimony of Mr. Asbury and this given in the absence of the Jury--the prior testimony of Mr. Asbury, no consent was given for this search by either Mr. Fickett, the owner of the vehicle, or Mr. Walker. Is that not correct?

ASBURY: Yes, sir. That's correct.

WALTER BILBRO: Also, Your Honor, at the same time at the preliminary hearing, Mr. Asbury indicated--

THE COURT: I--forget about the preliminary. You may note your exception on what's transpired here, gentlemen, and not on any preliminary.

WALTER BILBRO: If it please, Your Honor--Your Honor, may we direct a question of Mr. Asbury just to point out so we--as Mr. Frackelton did?

DAVID H. FRACKELTON: I would--

WALTER BILBRO: In support of this? It's my understanding that in addition to the dog getting into the interior passenger compartment and not reacting in any way, that the dog was also then led completely around the exterior of the car. Is that correct, Mr. Asbury?

ASBURY: That's correct.

WALTER BILBRO: And he did not react at that time either?

ASBURY: No, sir. All, there again, the trunk and I believe the doors were shut on the vehicle at that time.

WALTER BILBRO: You went completely around the car and he did not react. Is that correct?

ASBURY: Yes, sir.

WALTER BILBRO: Now, Your Honor--the cases, Your Honor, that we would cite to the Court being first, Your Honor, is the case of United States v. Chadwick, which can be found at 97 S.Ct. 2476. Briefly, Your Honor, that case a footlocker was suspected of containing--

THE COURT: Gentlemen, I'm familiar with those cases.

WALTER BILBRO: That is--

THE COURT: You don't have to cite them all in the record. You may note your exception to the Court's ruling and the law is the law whether you cite it or not.

WALTER BILBRO: Alright. You Honor, we would also--in support of our position, cite

the case of Arkansas v. Sanders. Would you like the citation again or--

THE COURT: No, I don't care for the citation. I just want you to have your record the way you want. But I'm not going--

WALTER BILBRO: Alright, sir. There's a case also, Your Honor, of Robbins v. California which also is a record in point. That case was decided July 1, 1981.

DAVID H. FRACKELTON: If the Court please, the purpose for this is so the Court can have ample opportunity to pass on the objections.

THE COURT: I thought I had passed on it, Mr. Frackelton. And you wanted to make up your record as I understood it.

WALTER BILBRO: And Your Honor, also the case we would recite is the Virginia case of Able v. Virginia, which is found in 272 S.E. 2d at page 204.

THE COURT: Alright.

DAVID H. FRACKELTON: If the Court please, we would except to the Court's ruling after

noting for the record--

THE COURT: Alright.

DAVID H. FRACKELTON: --and assuming the Court is intending to allow testimony and that is the indication of the Court, we would move for a mistrial if it's brought out before the Jury and cite the same authority. We state that in the absence of the Jury.

THE COURT: Alright. I have heretofore ruled. You've made up your record. So now we're ready to go, gentlemen. That's all it takes, Mr. Hall.

DANIEL M. HALL: Well--

THE COURT: I don't want to hear from the Commonwealth.

DAVID H. FRACKELTON: We except to the Court's ruling.

DANIEL M. HALL: In support of the testimony being offered, we would--

THE COURT: Well, I have said that it could come in so I don't feel that you have to put anything in support of it. I have ruled.

DANIEL M. HALL: Well, could we just make this statement. The defense has cited the Sanders case. The Sanders case said that--

THE COURT: Gentlemen, I don't want to cut you off, but I don't want any argument. I've ruled on the law and if I'm wrong, you all--somebody will correct me. That's--it's that simple. But I don't think I'm wrong.

DAVID H. FRACKELTON: Thank you.

DANIEL M. HALL: Well--

THE COURT: So we'll take a ten minute recess. Midmorning break.

WALTER BILBRO: Thank you, Judge. (Thereupon, after a short recess, the Jury returned to open court and the direct examination of Trooper James E. Asbury by Daniel M. Hall was continued.)

DANIEL M. HALL:

Q. Trooper Asbury, I believe you've stated that--before the recess--that you'd opened the trunk of the vehicle?

A. Yes, sir. That's correct.

Q. And would you proceed again as to--in

your own words to tell the Jury what transpired thereafter?

A. Yes, sir. After the narcotic dog had made an examination of the passenger compartment of the vehicle, he was then placed into--directed into the trunk area. Of course, the trunk was open. At this point, the dog reacted or alerted to a brown paper bag which was lying in the back of the trunk compartment.

DAVID H. FRACKELTON: If the Court please, with the same objection--

THE COURT: Continue.

A. Of course, the reaction is that the dog will scratch the particular area or article which it detects as having or containing or having the odor of a controlled drug which it has been trained to alert on. Trooper Gregory picked the bag up--the brown paper bag and handed it to me. Upon handing it to me, there was a rip in the side and you could visually observe white tablets which,

based on my experience and knowledge, appeared to be Methaqualone, or quaalude tablets.

Q. What else happened--what did you do with that at that--that evening with that bag when it was handed to you?

A. Of course, I took custody of the bag, opened the bag up and examined the contents of the brown bag.

Q. What did you find in the brown bag?

A. I discovered what appeared to be two clear plastic bags containing approximately a thousand units of Methaqualone or quaalude tablets scored "Lemmon 714", also four plastic bags containing a greeish-brown plant material and a Rohm 38 revolver.

Q. Based on your training and experience, could you determine what was the brown--brown plant material?

A. Yes, sir. It appeared and had the odor of Marijuana.

Q. Do you have the brown bag with the con-

tents you just testified to with you here in Court?

A. Yes, sir. I do.

Q. Would you please get those?

A. This dark black trash bag is an evidence bag which I placed the evidence into. This is the actual bag which was discovered in the trunk of the vehicle.

Q. This is the brown bag that you--

A. Yes, sir.

Q. Was handed to you?

A. That's correct.

Q. Did you open it at the scene?

A. Yes, sir. This is the tear in the bag which the white tablets were somewhat protruding from. On examining the bag, discovered four clear bags containing what appeared to be Marijuana, two clear bags containing white tablets scored "Lemmon 14."

Q. We ask that the bag and the contents be marked and admitted into evidence, Your Honor.

DAVID H. FRACKELTON: If the Court please, subject to the continuing objection.

THE COURT: Commonwealth Exhibit #1.

(Thereupon, Commonwealth Exhibit #1 was marked for identification.)

TRANSCRIPT OF PRETRIAL HEARING, PAGE 25, LINE 5 THROUGH LINE 15.

DANIEL M. HALL:

Q. Oh, excuse me, Your Honor. I asked you how many--

A. Yes, sir. At that time it was estimated that the bag, box contained approximately twenty-five to thirty thousand units of Methaqualone. The accurate count conducted by the lab technician revealed the total count to be twenty-six thousand two hundred three tablets.

Q. We ask that this bag with its contents be marked as an exhibit.

THE COURT: Commonwealth Exhibit #5.

DAVID H. FRACKELTON: Subject to the continuing objection, if the Court please.

THE COURT: Yes. (Thereupon, Commonwealth Exhibit #5 was marked for identification.)

APPENDIX B (3)

RULING ADMITTING SEARCH WARRANT AND ATTACHED AFFIDAVIT AT TRIAL

TRANSCRIPT OF PRETRIAL HEARING, PAGE 19, LINE 7 THROUGH PAGE 22 LINE 11.

DANIEL M. HALL:

Q. After examining that bag, what happened at this location?

A. At that point, Mr. Walker and Mr. Leonard were, of course, apprised what was discovered, the Marijuana and the Methaqualone, and informed that they were being placed under arrest.

THE COURT: Mr. Walker and who?

ASBURY: Mr. Fickett. Mr. Fickett was placed under arrest with the same--for what had been discovered in the trunk of the vehicle in the brown bag. There were several other items in the trunk of the vehilce, a large brown trash bag which appeared to contain a large box--felt like it was a box

structure--in addition to a brown suitcase, a green backpack and a dog food bag. Upon interviewing Mr. Walker and Mr. Fickett to ascertain ownership of these items, Mr. Fickett informed me that he owned the large dark trash bag with box structure as well as the suitcase and Mr. Walker informed me that he owned the green backpack. A request of consent to search was obtained from Mr. Walker and Mr. Fickett, they gave verbal consent to search these items; however, after filling out a consent form, both individuals refused to sign the form. At this point, I informed them that a search warrant would be obtained for the items. We departed the area in front of the Wright Equipment and went to the magistrate's office here in Abingdon. And subsequently a search warrant was obtained for the dark brown trash bag as well as the brown suitcase contained in the trunk of the vehicle.

DAVID H. FRACKELTON: If the Court please, at this stage, we would object to any search

warrant obtained unless the basis is layed, the results of any search warrant, be served a search warrant and we're objecting to it unless the basis is proper.

DANIEL M. HALL:

Q. I'm handing you a certified copy here. Is this a true and correct copy of the affidavit for that search warrant and the search warrant that you obtained at that time?

A. Yes, sir. It is.

Q. Ask that they be marked and admitted into evidence, Your Honor.

DAVID H. FRACKELTON: If the Court please, at this stage, we do object and would ask for a hearing on the matter. I think he has to lay the proper foundation before the search warrant can come in or the affidavit--

THE COURT: Alright, Mr. Sheriff, you may let the Jury go out. (Thereupon, the Jury retired to their room and the following proceedings were had out of their presence.)

DAVID H. FRACKELTON: If the Court please,

the basis of our objection is this point before further testimony is heard is number one, he has listed no reason for the Court, no testimony before the Jury, of any plausible reason for stopping the vehicle without a warrant. Number two, there has been a warrantless search which we have spoken to. Number three, there was a search of a bag as a result of a dog. Apparently there was a rip in the bag and he has testified he doesn't know how the rip got there, the dog was in the trunk of the car. After the bag came out, he saw the Methaqualone. Now he has testified that he simply obtained a search warrant. We have no basis, at this point, for a presentation to the magistrate.

THE COURT: I disagree with you, Mr. Frackelton. For the record there has been testimony of all the information from a reliable informant which is sufficient for a search warrant. Now, do you want to go into the search warrant before I bring the Jury back?

DAVID H. FRACKELTON: Now, is the Court addressing the affidavit which I'm sure the Court is familiar with and you have passed on that, do you deem that to be sufficient?

THE COURT: Yes, I did before, but I want to make up your record for you.

DAVID H. FRACKELTON: Yes, sir. We're objecting to that and we state an exception to the Court's ruling. And would reserve the right, if the Court please, at the close of the Commonwealth's evidence to make the proper citations in support of our position.

WALTER BILBRO: You Honor,--

THE COURT: Now, wait a minute, on one point, one attorney. This is the way we operate, gentlemen.

WALTER BILBRO: I was going to bring up a separate point.

THE COURT: Alright.

DAVID H. FRACKELTON: What is--is there a--may he address a separate point or do you want me to address the whole matter, Judge?

THE COURT: What is the separate point?

WALTER BILBRO: The separate point indicates, Your Honor, that throughout the entire testimony so far there's been no indication that the informant had sold drugs, purchased any drugs, had contact with any drugs, or knew that the drugs were in the car whatsoever. And that information is indicated not only in the search warrant, but also the entire force of Mr. Ashbury's testimony. And we suggest that (indistinguishable) that there's no information, there's been no testimony about who or where the informant got his information from. You've got double or triple heresay in this particular instance, Your Honor, I'd want to point out that to the Court.

THE COURT: You've pointed it out, the Court ruling is the same. Let the jury come in, Mr. Sheriff. (Thereupon, the Jury returned to open court and the following proceedings were had.)

THE COURT: Alright, gentlemen, let's proceed.

DANIEL M. HALL: We've asked that the search warrant and affidavit be marked and admitted into evidence.

THE COURT: Commonwealth Exhibit #2.

(Thereupon, Commonwealth Exhibit #2 was marked for identification.)

APPENDIX B (4)

ORDER OF AUGUST 4, 1981.

BOOK 45 PAGE 691

CASE NOS. 4-81-11 POSSESSION OF CONTROLLED DRUGS FOR SALE (2 COUNTS)

This day came Daniel M. Hall, Esquire, and R. Wayne Austin, Esquire, Attorneys for the Commonwealth; David H. Frackelton, Esquire and Walter Bilbro, Esquire, counsel for the defendant, Jo Crewey, Court Reporter, who was duly sworn in the manner prescribed by law; came also the defendant in the custody, of the Sheriff of Washington County.

The Attorney for the Commonwealth and the defendant, by counsel, announced ready for trial at this time.

The defendant was arraigned and upon his arraignment entered, in person, a plea of not guilty to each of the charges contained in the indictment against him,

to-wit: (2 Counts) Possession of Controlled Drugs for Sale.

Thereupon the Court ordered the venire summoned by the Clerk of this Court, according to law, for the trial of criminal cases at this term to be used for the trial of the defendant in this case, and twenty persons from said venire appeared in Court and were examined according to law and were found to be free from exceptions and qualified in all respects to serve as jurors in this case, and the Attorney for the Commonwealth and the defendant, by counsel, each struck off four persons from said panel alternately, the Attorney for the Commonwealth beginning, the remaining twelve, to-wit:

1. Dorothy C. Adams
2. Florence W. Arnold
3. Kemper Booher
4. Rosa W. Childress
5. Eileen M. Everitt
6. Edith C. Hall

7. Linda H. Hartsock

8. Cleveland Holmes

9. Walter M. Jones

10. Steward B. Larkey, Jr.

11. Francheska S. Puckett

12. Carl Blair Reynolds

constituted the jury for the trial of the defendant in this case, who were further sworn as required by law to try the issue in this case.

Thereupon the Attorney for the Commonwealth and the defendant, by counsel, made their opening statements. The Commonwealth introduced it's evidence and rested it's case. Thereupon the defendant, by counsel out of the presence of jury, moved the Court to strike the evidence of the Commonwealth, which motion the Court denied.

Thereupon the defendant by counsel, advised the Court that no evidence would be introduced on his behalf. After hearing the instructions of the Court and the argument of counsel, the jury retired to their room

to consider of their verdicts and after some time returned into court having found the following verdicts: "We the jury, find the defendant, Walker guilty of possessing methaqualone with intent to distribute as charged and fix his punishment at yes, $25,000,00 Fine, 25 year sentence, Foreman, Stuart Larkey; "We, the jury find the defendant, Walker guilty of possessing marijuana, with intent to distribute as charged and fix his punishment at yes, $1,000.00 Fine, Foreman, Stuart Larkey.

There being no objections to the form of the verdicts the jury was discharged as to this case, after being polled and each member having indicated this was their verdict.

On motion of the defendant, by counsel, it is ordered that a Probation Officer of this Court prepare a Pre-Sentence Report on the defendant returnable as soon as practicable.

Thereupon counsel for the defendant

advised the Court of his intention to file a motion to set the verdict aside in this case. The Court doth allow the defendant 14 days in which to assign his grounds in writing in support of said motion.

The defendant is remanded to jail.

The Court certifies that the defendant was present and his attorneys were likewise present during all stages of this proceeding.

During the course of this trial certain motions were made and objections interposed which will appear fully in the stenographic record herein made.

The defendant by counsel moved the Court to release the surety on the defendant's bond herein, which motion the Court denied.

It is ordered that Jo Crewey, Court Reporter, be allowed $50.00 for her services.

APPENDIX B (5)

ORDER OF OCTOBER 14, 1981

BOOK 46 PAGE 181

POSSESSION OF CONTROLLED DRUGS FOR SALE

(TWO COUNTS)

This day came Daniel M. Hall, Esquire, Attorney for the Commonwealth, David H. Frackelton, Esquire, local counsel for the defendant, Ellen R. Farrington, Probation Officer of this Court, Lisa O. Tuell, Court Reporter, who was duly sworn in the manner prescribed by law; came also the defendant in the custody of the Sheriff of Washington County.

The defendant, by counsel, having heretofore filed on August 18, 1981, a motion to set the verdict aside in this case, thereupon the Court heard argument on said motion, at the conclusion the Court denies the motion to set the verdict aside.

It appearing to the Court that the

defendant was tried in this Court on August 4, 1981, at which time the jury found him guilty as charged in the indictment herein, to-wit: Possession of controlled Drugs For Sale (2 Counts). The jury fixed the punishment of the defendant at 25 years in the penitentiary and a fine of $25,000.00 on Count #1; and a fine of $1,000.00 on Count #2.

Upon motion of the defendant, by counsel, a Pre-Sentence Report was ordered prepared on the defendant. The said report was filed on September 24, 1981, a copy was furnished to counsel for the defendant. The Attorney for the Commonwealth and the attorney for the defendant were afforded the opportunity to examine the Probation Officer as to the contents of the report, but no questions were asked.

Thereupon it was demanded of the defendant if anything he had or knew to say why the Court should not sentence him according to law, nothing being said or offer-

ed in delay of judgment, it is ordered that James Leonard Walker be and he is hereby sentenced to a term of twenty-five years in the penitentiary of this Commonwealth and to forfeit unto the Commonwealth a fine of $25,000.00 on Count #1; and sentenced to forfeit unto the Commonwealth a fine of $1,000.00 on Count #2. Further he is ordered to pay the costs incident to this prosecution.

Thereupon the defendant, by counsel moved the Court to suspend execution of the aforesaid sentence and to place the defendant on probation. The Court heard statements by the Attorney for the Commonwealth and the attorney for the defendant, and after mature consideration doth deny the motion for probation.

The defendant is remanded to jail to be transferred to the appropriate penal institution of this Commonwealth.

The Court certifies that the defendant was present and his attorney was

likewise present during all stages of this proceeding.

APPENDIX B (6)

RULING DENYING INSTRUCTION "C"

TRANSCRIPT OF TRIAL, PAGE 79, LINE 12 THROUGH LINE 24.

THE COURT: Alright. C is refused, covered by other instructions.

DAVID H. FRACKELTON: Well, if the Court please, I think we're entitled to offer an instruction on this point--

THE COURT: Well, you just did and I just refused it as being repetitious.

DAVID H. FRACKELTON: I understand as the defendants and I think if we have a proper statement of the law and it has been incorporated in piecemeal in other instructions, we're still entitled to have the Court give it in its proper form as offered by the defendant. We'd except to the Court's ruling.

THE COURT: That's what I did. I gave it in

proper form and refused yours, Mr. Frackelton.

DAVID H. FRACKELTON: Thank you, Your Honor.

APPENDIX B (7)

RULING DENYING INSTRUCTION "H"

TRANSCRIPT OF TRIAL, PAGE 80, LINE 13 THROUGH PAGE 81, LINE 4.

THE COURT: Yes, it's covered by instruction, I believe the number is six. That covers all presumption and reasonable doubt.

DAVID H. FRACKELTON: Alright, then the Court will not entertain any further instructions on reasonable doubt?

THE COURT: No, I entertain all the instructions you present, Mr. Frackelton, but I think you know the law of the Commonwealth. Refused, repetitious of what's been granted.

WALTER BILBRO: You Honor, I agree that the discussion about whether or not he's been indicted and the fact that he has not testified at the trial has been already given, but this talks about the fact that he

was arrested and never testified to it in court and the fact that he's been brought before this Court for trial is not in any of the charges. And I would suggest in that instance, it would not be repetitious, and we would ask that you grant at least those portions of the charges.

THE COURT: Refused. Reasonable doubt has been given. H is refused...

APPENDIX C (1)

PRETRIAL MOTION TO DISQUALIFY MAGISTRATE AND SUPPRESS EVIDENCE

MOTIONS

IN ACCORDANCE WITH Rule 3A:12 and Rule 3A:14 of Supreme Court Rules.

Comes now the Defendant, James Walker, by counsel who moves the Court as follows:

I.

That the original warrant in this action be dismissed and the search warrant issued in this action be declared null and void, all on account of the disability of the issuing magistrate but nevertheless if the same are not dismissed and declared null and void, that the counsel for the defendant be allowed to inspect and copy any relevant written or recorded statements or confessions made by the accused that are known by the Commonwealth's Attorney to be within the possession, custody or control of the Com-

monwealth.

II.

In support of this Motion, defendant, by counsel states that the appointment of Fonda B. Smith as a full time Magistrate of the 28th Judicial District for a term beginning April 1, 1977 and ending March 31, 1981 as evidenced in Common Law Order Book 40, page 523 in the Office of the Clerk of the Circuit Court of Washington County, Virginia, is null and void ab initio on account of her prior appointment as a part time Correctional Officer as evidenced by Order dated July 7, 1976 which Order appears of record in said Clerk's Office in Common Law Order Book 40, page 56 (See Code of Virginia, Section 19.2-37)...

APPENDIX C (2)

EXHIBITS AT PRETRIAL MOTION

BOOK 40 PAGE 55

IN THE CIRCUIT COURT OF WASHINGTON COUNTY VIRGINIA

IN RE: TERRY PRATER

FONDA SMITH

SHIRLEY McGLAMERY

DAVID LEE WHITE

EMORY BRUCE HOWARD

ORDER

Robert A. Clendenen, Sheriff of Washington County, Virginia, having certified in writing to the Court that he has appointed Terry Prater, Fonda Smith and Shirley McGlamery from Part-Time Correctional Officers to Full-Time Correctional Officers, David Lee White as Full-Time Correctional Officer and Emory Bruce Howard as Deputy Sheriff, all effective as of July 1, 1976, it is ORDERED that a record be made of

these appointments and the same be entered in the LAW BOOK of this Court.

BOOK 40 PAGE 522

IN THE CIRCUIT COURT OF

WASHINGTON COUNTY, VIRGINIA

RE: NELLIE FOSTER, MATRON AND DEPUTY SHERIFF

ORDER

Robert A. Clendenen, Sheriff of Washington County, Virginia, having certified in writing that he has appointed Nellie Foster as Matron and Deputy Sheriff, replacing Fonda Smith, effective as of April 1, 1977, it is ordered that a record of this appointment be made and the same entered in the Law Book of this Court.

BOOK 40 PAGE 523

VIRGINIA: IN THE CIRCUIT COURT OF WASHINGTON COUNTY

IN RE: APPOINTMENT OF MAGISTRATES

ORDER

Pursuant to Section 19.2-35 of the Code of Virginia of 1950, as amended, it is ORDERED that Fonda B. Smith, Route 3,

Woodcliffe Subd., Abingdon, Virginia, 24210, is hereby appointed a Full-time Magistrate of the Twenty-Eighth Judicial District for a term beginning April 1, 1977 and ending March 31, 1981.

It is further ORDERED that before entering upon the duties of her office, she shall qualify before the Clerk of the Circuit Court of Washington County, by taking the oath of office as required by law.

The Clerk is directed to forward a copy of this Order and the oath of office to each of the Circuit Court Clerk's Offices in the Twenty-Eighth Judicial Circuit who shall spread the same upon the Law Order Book. The Clerk shall also forward certified copies of this Order and the oath of office to Robert N. Baldwin, Executive Secretary of the Supreme Court of Virginia, and to Francis M. Hoge, Chief General District Court Judge, Courthouse, Marion, Virginia and Douglas L. Brown, Chief Magistrate, 401 Belleair Lane, Bristol, Virginia and Fonda

B. Smith, respectively of the Twenty-Eighth Judicial District.

APPENDIX C (3)

TRIAL TRANSCRIPT DEALING WITH SUPPRESSION MOTIONS

TRIAL TRANSCRIPT, PAGE 4, LINE 13 THROUGH PAGE 22, LINE 11

Q. Did you arrest the defendant on December 11, 1980?

A. Yes, sir. I did.

Q. Had--when did your investigation that lead to this arrest start?

A. The initial investigation was initiated approximately two weeks prior to December 11th.

Q. Did you receive any specific information that lead to the arrest on December 11th?

A. Yes, sir. I did. I received information in the a.m. on December 11th--

DAVID H. FRACKELTON: Well, we would object to any specific information that he may have received, if the Court please.

THE COURT: Objection sustained.

DANIEL M. HALL:

Q. How did you receive this information?

A. I received information via telephone communication with a--

DAVID H. FRACKELTON: Well, if the Court please, we are going to object to who he might have received it from unless that person is here available to testify.

THE COURT: Overruled.

DANIEL M. HALL:

Q. Who did you receive this telephone call from?

A. From a confidential informant.

Q. Had you dealt with this person before?

A. Yes, sir. I had.

Q. How many times?

A. Numerous--on numerous occasions, approximately eighteen months prior to December 11th this particular informant had been providing me with information relating to the drug traffic.

Q. Had you been able to make any arrests?

A. Yes, sir.

Q. Based on his information?

A. Yes.

DAVID H. FRACKELTON: If the Court please, we are going to object to that.

THE COURT: Let's get down to the issue of this case, Mr. Commonwealth.

DANIEL M. HALL:

Q. As a result of the information received, what did you do?

A. On December 11th, as a result of that information, a surveillance was maintained in the Abingdon area in regard to looking for a described--or not a described vehicle at that time, but an individual known as Jim Walker who was purported to be going to be in the Abingdon area on December 11th in the p.m.

Q. Did you have any information as to what he would be in possession of?

DAVID H. FRACKELTON: Well, if the Court please, this is a hearsay now and we're objecting to it.

THE COURT: Objection sustained.

DAVID H. FRACKELTON: And we would ask for the Jury to be cautioned on it, Judge--

THE COURT: Alright, proceed.

DANIEL M. HALL:

Q. How was this surveillance established?

A. The surveillance--I did not actually participate in the surveillance--it was established through--

WALTER BILBRO: We would object, Your Honor, if he didn't participate in the surveillance anything he knows about it would again be heresay.

DANIEL M. HALL: No, the question was, Your Honor--

THE COURT: He may state what he did and what he saw.

DANIEL M. HALL: Yes, the question was how it was established, not whether he participated.

WALTER BILBRO: He said he didn't do it because he didn't participate in it.

THE COURT: Overruled.

DANIEL M. HALL:

Q. Did you participate in the establishment of the surveillance?

A. Yes, sir. I had notified my supervisor, Bob Woodard, who is in charge in the narcotics unit, informed him of a possible impending drug transaction in the Abingdon area. And, of course, a surveillance was established in the p.m. on December 11th.

Q. Do you know how it was set up?

A. Not the early part of the surveillance. I informed Mr. Woodard to have the surveillance people participating in the surveillance to go by the local motels in the Abingdon area to determine any out of state vehicle, perferably a South Carolina vehicle, displaying South Carolina registration.

Q. Was such vehicle located?

A. There was a vehicle located but it did not have a South Carolina registration displayed. Individuals in and around

the vehicle were identified as possible suspects.

Q. When and where did you receive information as to that location for the locating of that vehicle?

A. I had received information approximately six, six-thirty p.m. that a described vehicle had been sighted at the Empire Motel here in Abingdon.

Q. How did you receive that information?

A. I received it by radio communication.

Q. What did you do as a result of that information?

A. As a result of that information, well I didn't actually do anything at that point. The other members maintained a surveillance on the vehicle.

Q. When did you next take action? In regard to this matter?

A. After receiving information from the confidential informant that he would be making con--

DAVID H. FRACKELTON: If the Court please,

we're going to object to anything the confidential informant might have told this man.

DANIEL M. HALL:

Q. Did you receive a further communication then from the informant?

A. Yes, sir.

Q. Was it the same person you talked to previously?

A. Yes, sir.

Q. When did you get that information?

A. That would have been around six or six-thirty p.m. on December 11th.

Q. Was there any prearrangement?

A. Yes, sir.

Q. And how did you receive this communication?

A. This communication was dealt with directly with personal contact with the informant.

Q. Okay. You met him personally?

A. Yes, sir.

Q. When and--when and where?

A. Actual contact was made in Lebanon,

Virginia. There again, at approximately six, six-thirty p.m., the evening of December 11th.

Q. Okay. How long were you with him?

A. Well, off and on for the remainder of the evening up until Mr. Walker was arrested, right around nine o'clock.

Q. And where did you go?

A. The informant and I traveled to Statzer--the restaurant which is located north of Abingdon on Route 19 where a telephone call was placed.

Q. Were you with the informant when the call was placed?

A. Yes, sir.

Q. Had there been an arrangement with you and the informant upon the placing of the call?

A. Yes, sir.

Q. As a result of the placing of that call, what happened?

A. The call was placed, the indication to come by--

DAVID H. FRACKELTON: If the Court please, he said as a result of that call, this isn't responsive.

THE COURT: Answer the question that was asked, Mr. Asbury.

ASBURY: As a result of the call, the informant was advised to come on to the Empire Motel.

DANIEL M. HALL: Did you take--

DAVID H. FRACKELTON: We're going to object to that, if the Court please, and ask what he did as a result of it--

THE COURT: Disregard that, members of the Jury.

DAVID H. FRACKELTON: --now Mr. Hall and Mr. Asbury are experienced in this.

DANIEL M. HALL: (To witness) Did you tell the informant where to call?

DAVID H. FRACKELTON: We're going to object to that as leading, if the Court please.

THE COURT: Alright, just let the witness testify and Mr. Asbury you know what you can testify to.

DANIEL M. HALL:

Q. What arrangement did you have with the informant as to placing that call?

A. The informant had already received information to place the call. I was merely present whenever the call was placed.

Q. And after he placed the call, what happened?

A. He drove to the Mountain Empire--

DAVID H. FRACKELTON: We're going to object to that, if the Court please. I think this gentleman can testify to what he did. Did you--if Mr. Asbury went with him, I'll withdraw the objection.

THE COURT: Overruled, Mr. Frackelton.

DAVID H. FRACKELTON: State an exception.

THE COURT: You may.

DANIEL M. HALL:

Q. As a result of that call, what happened?

A. He drove to the Mountain Empire Motel under my observation and drove into the parking area which, at that point, I did

not maintain observation of his vehicle--

Q. Well--

A. --which was picked up by other members in the surveillance team.

Q. You say you maintained observation. Just tell the Jury in your own words, how you--

A. I was in my vehicle behind the informant whenever he arrived at the Mountain Empire.

Q. Where did you go then?

A. I was located in the vicinity of the parking area. I believe there's a Texaco which adjoins the property of the Empire Motel. I was positioned in the parking area of the Texaco service station.

Q. What were you doing there?

A. At that point, I was, of course, communicating with other members of the surveillance team via radio awaiting the return of the informant.

Q. And did you see where the informant went?

A. No, sir. Not--not actually the room that he entered.

Q. Was he under observation by other members of the team?

A. Yes, sir.

Q. Who--who were the other members of the team at that point conducting the surveillance?

A. There was Trooper Bob Givens, Trooper Tony Bolling, our Assistant Special Agent in Charge, Bob Woodard, Special Agent Al Crane.

Q. Is Mr. Givens here today?

A. Yes, sir.

Q. What next happened that you saw?

A. After approximately five minutes, five to ten minutes, the informant departed the area of the Empire Motel where I reestablished personal contact with the informant.

Q. How did you do that?

A. We were--well, we contacted--I contacted the informant approximately a mile from

the Empire Motel, stopped on Route 11.

Q. Did you follow him out there in your car?

A. Yes, sir. I did.

Q. And at that point, you had conversation with him?

A. Yes, sir.

Q. How long were you with him there?

A. Approximately five to ten minutes.

Q. As a result of your conversation with him there, what did you do?

A. As a result of that conversation, the informant returned to the Empire Motel. I reestablished myself at the previous location on the parking area of the Texaco service facility and awaited for the informant to depart the motel property.

Q. Did you follow him back to the motel from your meeting place?

A. Yes, sir.

Q. And did you see where he went at the motel?

A. No, sir. There again, I did not visual-

ly observe him enter any room or know exactly where--

Q. Was he again under observation by other members of the team?

A. Yes, sir.

Q. What next happened in regard to the--this matter?

A. After approximately five to ten minutes, the informant departed the premises of the Empire Motel being followed by a vehicle described as a '75 Mercury, sort of a silverish-gray in color, bearing Florida registration. This vehicle was immediately behind the informant's vehicle, which both vehicles traveled south on Route 11 coming back into the Town of Abingdon. Of course, the vehicles were under surveillance by other members of the surveillance team as well as myself.

Q. Who was driving the vehicle? The 1975 Mercury?

A. Well, at that point, I did not know who

the operator of the vehicle was until, of course, it was subsequently stopped and a determination made that the operator of the vehicle was Mr. James Walker.

Q. And he is the gentleman here in court today?

A. Yes, sir. He's sitting to my left at the defense table.

Q. And what was the registration number of the vehicle?

A. TSB-746 which, there again, was a Florida registration.

Q. Now, as the vehicle driven by Mr. Walker left the Empire Motel, what position did you take and where were the other members of the surveillance team?

A. Yes, sir. I was approximately--

Q. Excuse me, Trooper Asbury, would you just tell the Jury from that point as you left the motel, in your own words, who and where and what they did, the whole thing that happened from there to

the arrest of Mr. Walker.

A. There again, I was not attained as far as the particular agent or trooper or which particular vehicle was directly behind Mr.--the vehicle that was under surveillance. I was, I believe, about three vehicles back with two other surveillance vehicles in between my vehicle and was still able to maintain observation of the vehicle that Mr. Walker was in. The vehicle drove south on Route 11 through Abingdon, as prearranged a marked cruiser, blue and gray marked cruiser with a uniformed trooper was positioned approximately a half a mile south of the corporate limits of Abingdon on Route 11. After the vehicle passed this marked vehicle, it was stopped in front of the Wright Equipment which is located about a mile and a half south of the Abingdon corporate limits by the uniformed member. After stopping the vehicle, of course, other personnel in

the surveillance team merged on the vehicle as well as myself and to discover Mr. Walker, James Walker, the operator of the vehicle, a Leonard Fickett, the passenger of the vehicle. After stopping the vehicle, I identified myself to Mr. Walker and Mr. Fickett and informed them that I had received information from a confidential informant that the vehicle was being used to transport illicit narcotics, namely Methaqualone or quaaludes, and possibly Marijuana. At this point I informed them that a warrantless search of the vehicle would be conducted as a result of this information.

DAVID H. FRACKELTON: I didn't hear that. A what?

A. A warrantless search of the vehicle would be conducted as a result of information which had been provided to me by the confidential informant. They were in the vicinity of the vehicle,

were not at that point placed under arrest. They were standing around the general area with other members of our surveillance team. In our company was also a narcotics dog which has been trained to alert on various narcotics. He was being handled by Trooper Jerry Gregory who has been--has received extensive training in the handling of this particular narcotic dog. Trooper Gregory in using the dog to conduct a cursory examination of the vehicle to determine if the vehicle would be--had any form of illicit narcotic, Marijuana, cocaine, heroin, what have you. The dog was directed to get into the passenger compartment of the vehicle which it did not respond or alert on any particular item or any area within the passenger compartment of the vehicle. The trunk to the vehicle was opened--

APPENDIX C (4)

PETITIONER'S MOTION TO SET ASIDE VERDICT

MOTION TO SET ASIDE VERDICT

Comes now the defendant who moves that the jury verdict returned in this action be set aside on account of the following:

I.

The Court erred in failing to dismiss as null and void the original warrant in this action together with the search warrant issued by the same magistrate in this action, all on account of the statutory disability of said magistrate.

II.

The Court erred in failing to allow the defendant to adequately voir dire the jury panel a to the relationship and association of any of said panel with prospective witnesses for the Commonwealth.

III.

The Court erred in failing to suppress evidence gained in the warrantless search of the locked trunk.

IV.

The Court erred in failing to suppress evidence gained in the warrantless search of personal baggage in the locked trunk of the automobile, the defendant was operating.

V.

The Court erred in failing to suppress evidence gained in the subsequent search with warrant of personal baggage in the locked trunk of the automobile.

VI.

The Court erred in failing to grant the defendant's motion for a mistrial after overruling objections to introduction of any evidence gained during the searches.

VII.

The Court erred in failing to grant the defendant's motion to strike the Common-

wealth's evidence at the close of the Commonwealth's case and again when renewed after the defendant announced that he rested.

VIII.

The Court erred in granting the instructions within the province of defendant's case as offered by the Commonwealth and in failing to grant defendant's instructions based on his theory of the case as offered.

APPENDIX C (5)

NOTICE OF INTENTION TO APPEAL

NOTICE OF APPEAL

The defendant, James Walker, by counsel, files his notice that he will appeal to the Supreme Court of Virginia from the Final Order of this Court entered on October 14, 1981.

A transcript of testimony will be hereafter filed. Said transcript of the proceedings has been recognized by an Order of this Court entered October 22, 1981 in accordance with Rule 5:9 of the Rules of the Supreme Court of Virginia.

JAMES WALKER

By Counsel

APPENDIX C (6)

TRIAL COURT'S INSTRUCTIONS TO JURY

INSTRUCTION NO. 1 (Granted JAM)

You are the judges of the facts, the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements. While you have no right to arbitrarily disregard believable testimony of any witness, you do have a right to discard or accept in whole or in part the testimony of any witness which you think is proper to discard or accept when you consider it in connection with other evidence in the case. You are entitled to use your common sense in judging

any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

INSTRUCTION NO. 2 (Granted JAM)

It is not necessary that facts be proven by direct evidence, for they may also be proved by circumstantial evidence. You may convict the defendant on circumstantial evidence alone, or on circumstantial evidence combined with other evidence, if you believe from all the evidence that the defendant is guilty beyond a reasonable doubt.

However, when the Commonwealth relies upon circumstantial evidence you should consider such evidence with great care and caution. The circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt.

The evidence as a whole must exclude every reasonable theory of innocence.

INSTRUCTION NO. 3 (Granted JAM)

This Court also instructs the jury that you may take the proven actions of the Defendant as evidence of his intent, that is, as part of the circumstantial evidence, the Defendant may be taken to intend the natural and necessary consequence of any act proven to be done by him.

INSTRUCTION NO. 4 (Granted JAM)

The fact that the defendant has been indicted by a grand jury is not evidence against him and you should not consider it.

INSTRUCTION NO. 5 (Granted JAM)

The defendant does not have to testify, and his failure to do so shall not be considered by you.

INSTRUCTION NO. 6 (Granted JAM)

The defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted

and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

INSTRUCTION NO. 7 (Granted JAM)

The defendant is charged with the crime of possession with intent to distribute Methaqualone which is a Schedule II controlled substance. The Commonwealth must

prove beyond a reasonable doubt that the defendant possessed with intent to distribute Methaqualone.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt the above element of the offense as charged, then you shall find the defendant guilty and fix his punishment at a term of imprisonment of not less than five (5) nor more than forty (40) years and a fine of not more than $25,000.00.

If you find that the Commonwealth has failed to prove the element of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

INSTRUCTION NO. 8 (Granted JAM)

The defendant is charged with the crime of possession with intent to distribute marijuana which is a controlled substance. The Commonwealth must prove beyond a reasonable doubt that the defendant possessed with intent to distribute more than one half ounce and less than five pounds of

marijuana.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt the above element of the offense as charged, then you shall find the defendant guilty and fix his punishment at a term of imprisonment of not less than one (1) nor more than ten (10) years, or confinement in jail for not more than twelve (12) months, and a fine of not more than $1,000.00, either or both.

If you find that the Commonwealth has failed to prove the element of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

INSTRUCTION NO. 9 (Granted JAM)

Knowledge that the drug possessed is a controlled substance is an element of the crime of possessing with intent to distribute. Thus, you may not find the defendant guilty of such crime unless you believe beyond a reasonable doubt that he was aware that the substance he possessed was a con-

trolled substance. It is not necessary, however, for you to find that the defendant was aware that the very act of possessing was against the law.

INSTRUCTION NO. 10 (Granted JAM)

To knowingly and intentionally possess a controlled substance means that a person is aware of the presence and character of the substance and has actual physical possession or constructive possession. Actual physical possession means that the substance is found on the person. Constructive possession means that the person has dominion or control over the substance. Mere proximity is not enough.

Possession need not be exclusive; it may be shared with another. The length of time of the possession is not material.

Ownership or occupancy of the premises in which a controlled substance is found does not create a presumption that the owner or occupant either knowingly or intentionally possessed such substance. Such

ownership or occupancy is a fact which may be considered with other evidence.

Possession may be proven by acts, declarations or conduct of the defendant from which it may be fairly inferred that he was aware of the presence and character of the substance at the place found.

INSTRUCTION NO. 12 (Granted JAM)

To possess with intent to distribute requires both possession and intent. In determining whether possession is with such intent, you may consider all the evidence and circumstances which relate to that point including but not limited to: the quantity possessed; the manner of packaging; the location at which the substance was possessed; and evidence of use of the substance by persons other than the defendant at the time it was seized.

INSTRUCTION NO. A (Granted JAM)

The Court instructs the jury that proof of possession requires more than proof of mere presence, and the Commonwealth must

show defendant had dominion and control over the thing allegedly possessed or had the right to exercise dominion and control over it.

INSTRUCTION NO. I (Granted JAM)

Criminal intent under the law means an intent in the defendant's mind at the time of the commission of an act to violate the criminal law by commission of that act. In other words, "criminal intent" means the intention to commit a crime at the time the act is committed. More particularly in this case, "criminal intent" means the intention of the defendant to knowingly and unlawfully distribute illegal controlled drugs.

INSTRUCTION NO. L (Granted)

If you believe that any witness has knowingly testified untruthfully as to any material fact in this case, you do not have to accept any of the testimony of that witness, or you may give that testimony such weight as you feel it is entitled.

APPENDIX C (7)

PETITIONER'S REQUESTED INSTRUCTIONS TO JURY LETTERED "C" AND "H"

INSTRUCTION C (Refused JAM)

The term "not guilty" is not synonomous with "innocence." In our system of criminal justice, the term, "not guilty" means that the Commonwealth did not prove the defendant guilty beyond a reasonable doubt of each element of an offense; "not guilty" does not mean that you must find the defendant "innocent" of the crimes with which he was charged. The charges were simply not proven by the Commonwealth.

INSTRUCTION H (Refused JAM)

Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the en-

tire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.'

APPENDIX C (8)

SEARCH WARRANT ISSUED BY MAGISTRATE

General District Court

TO ANY AUTHORIZED OFFICER:

You are hereby commanded in the name of the Commonwealth to forthwith search either in day or night

Items in trunk of 1975 Mercury bearing Florida reg. TSB 746, I.D. 5493H500510, namely one dark brown plactic trash bag, and one brown suitcase alledgedly belonging to John Joseph Fickett for the following items: illegal and/or controlled drugs, namely methaqualone and/or other illegal narcotics contraband and monies, records and equipment used in narcotics distribution

You are futher commanded to seize said items if they be found and to produce before this Court all items seized together with the person on whose possession the same are found. This search warrant is issued in relation to an offense substantially described

as follows: possession of controlled substance with intent to distribute Section 18.2-248 of the Code of VA.

I, the undersigned, have found probable cause to believe that the property constitutes evidence of the crime identified therein or tends to show that the person(s) named herein has committed or is committing a crime, and further that the search should be made, based on the statements in the attached affidavit sworn to by

James E. Asbury, Virginia State Police
Name of Affiant

12-11-80 11:27 p.m.
Date and Time

S/FONDA B. SMITH
Magistrate

SEARCH INVENTORY AND RETURN

The following items, and no others, were seized under authority of this warrant:

(1) Brown trash bag containing cardboard box containing large quantity of white tablets with LEMMON 714 inscribed thereon.

(2) Small booklet (black)

(3) Hand calculator

(4) Metal cylinder box (gold in color) with greenish brown plant material, bookmatches, cigarette wraps, metal clip therein.

The statement above is true and accuratre to the best of my knowledge and belief.

12/11/80 (Date) S/ J. E. Asbury (Affiant)

Subscribed and sworn before me this day

(Date) S/Bobbie W. Keen, Deputy Clerk

NOTARY My commission expires _____

EXECUTION

Executed by searching the within described place, person or thing.

12/11/80 11:35 P.M.
Date and Time Executed

Tpr. J. E. Asbury

Certified to Washington County

Circuit Curt on Dec. 12, 1980

J. E. Asbury
(Executing Officer)

Received on Dec. 12, 1980

by S/ Bobbie W. Keen, Dep.
Clerk, Circuit Court

AFFIDAVIT FOR SEARCH WARRANT

The undersigned Applicant stated under oath:

1. A search was requested in relation to an offense substantially described as follows: Affiant has received information from a confidential informant who has reason to believe the vehicle described in para 2 was/is being used to transport ellicit narcotics and/or marijuana. Search of vehicle and articles will be for controlled drugs. Possession with intent to distribute 182-248.

2. The place, person, or thing to be searched was described as follows: Items in trunk of 1975 Mercury bearing Florida reg. TSB746 I.D. 5493H500510, namely: One dark brown plactic trash bag containing what appears, in structure, to be a box and one brown suitcase, alledgedly belonging to JOHN JOSEPH FICKETT, by his admission.

3. The items to be searched for were described as follows: Illegal and/or controlled drugs namely methaqualone and/or other illegal narcotic, contraband and

monies, records and equipment used in narcotics distribution.

4. The material facts constituting probable cause that the search should be made were: Affiant has received information from a confidential informant who had reason to believe, through personal knowledge, described vehicle in para 2 is/was being used in the transportation and concealment of illicit narcotics namely methaqualone and/or marijuana. Confidential informant advised a drug transaction was to occur involving vehicle described in para 2 and occupant or occupants therein. Vehicle and occupants were observed in Abingdon, Va. on December 11, 1980, at approximately 8:45 P.M., traveling south on U.S. 11. Based on information received from confidential informant vehicle was stopped and search conducted. Information was provided within past 24 hours of December 11, 1980.

5. The object or thing searched for constitutes evidence of the commission of such

offense.

6. I was advised of the facts set forth in this affidavit, in whole or in part, by an informer. This informer's credibility or the reliability of the information may be determined from the following facts: Affiant has been provided with information from this confidential informant over the past 18 months. Information has led to the arrest and conviction of approximately 20 narcotics violators. All information affiant has received from this informant has proven to be extremely accurate and highly reliable. Each time affiant acted on information, drugs have been seized and arrest, as well as conviction of those arrested have resulted. Affiant has never received inaccurate information from this confidential informant.

The statements above are true and accurate to the best of my knowledge and belief.

Trooper S/James E. Asbury James E. Asbury

TITLE OF APPLICANT APPLICANT Virginia State Police

Subscribed and sworn to before me this day.

12-11-80 11:14 S/FONDA B. SMITH

Date and Time

APPENDIX C (9)

WARRANT OF ARREST-FELONY ISSUED BY MAGISTRATE

TO ANY AUTHORIZED OFFICER:

You are hereby commanded in the name of the Commonwealth of Virginia forthwith to arrest the Accused, and to bring the Accused before the Court to answer the charge that the Accused, within this city or county, on or about December 11, 1980 did unlawfully and feloniously possess with intent to sell, a controlled substance, namely marijuana in violation of Section 18.2-248, Code of Virginia.

I, the undersigned, have found probable cause to believe that the Accused committed the offense charged, based on the sworn statements of Trooper James E. Asbury, Virginia State Police, Complainant.

12-12-80 12:30 a.m.
Date and time issued

S/Fonda B. Smith
Magistrate

WARRANT OF ARREST-FELONY

TO ANY AUTHORIZED OFFICER:

You are hereby commanded in the name of the Commonwealth of Virginia forthwith to arrest the Accused, and to bring the Accused before the Court to answer the charge that the Accused, within this city or county, on or about December 11, 1980 did unlawfully and feloniously possess with intent to sell, a controlled substance, namely Methaqulone listed in Schedule 2 in violation of Section 18.2-248, Code of Virginia.

I, the undersigned, have found probable cause to believe that the Accused committed the offense charged, based on the sworn statements of Trooper James E. Asbury, Virginia State Police, Complainant.

12-12-80 12:30 a.m.
Date and time issued

S/Fonda B. Smith
Magistrate